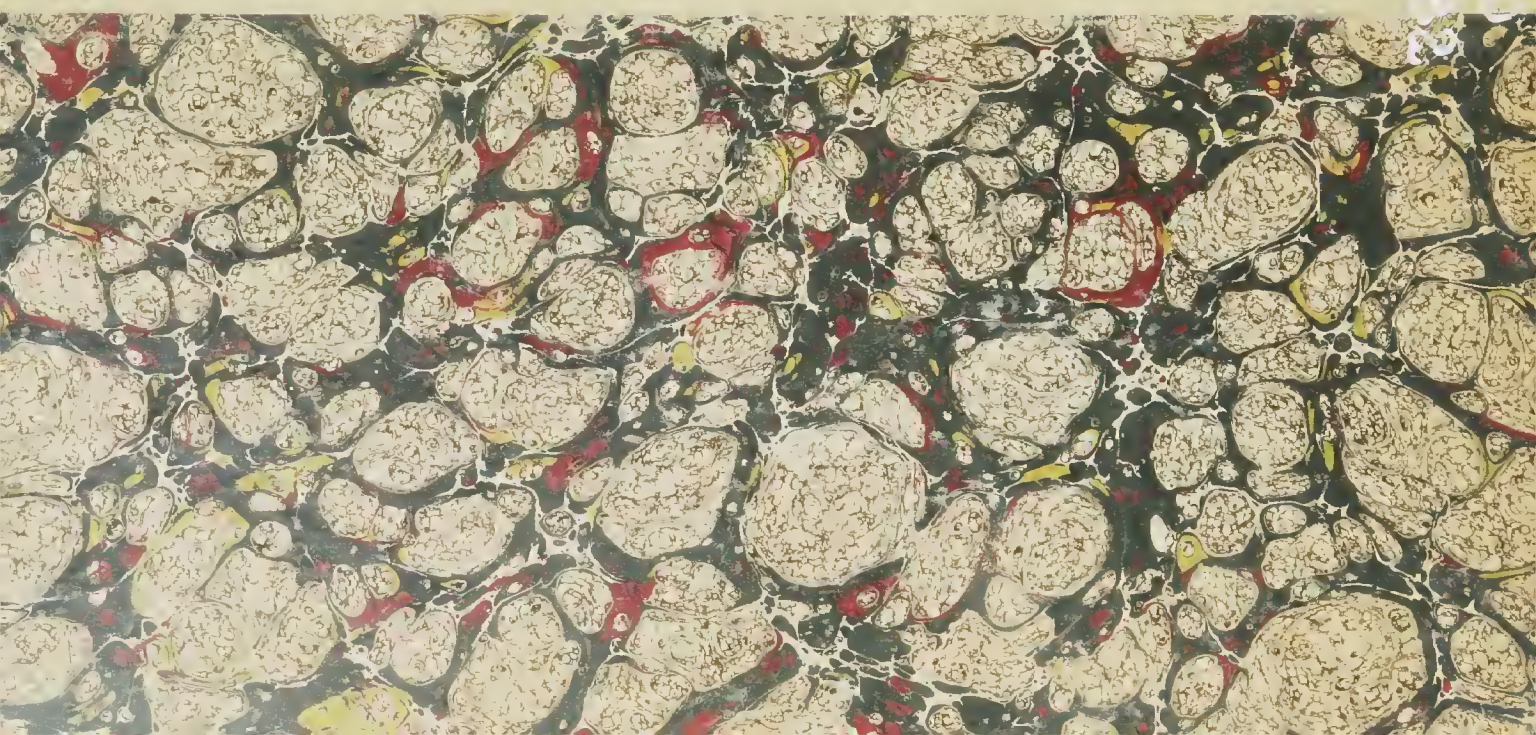
1908 JENNER The Octopus Reaching for Books



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REACHING FOR BOOKS

CONSIDERATIONS UPON THE PENDING COPYRIGHT BILLS, PARTICULARLY IN REPLY TO THE PUBLISHERS' ARGUMENTS; UPON THE SUBJECTS OF IMPORTATION; LABOR INTERESTS; FOREIGN LAWS; COMPLETENESS OF THE LIBRARY OF CONGRESS; CONTROL OF RETAIL PRICES; AND A RENEWAL TERM TO AUTHORS

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PREFATORY NOTE.

I owe to my friends and well wishers an apology for selecting a title for this pamphlet so whimsical as "*The Octopus: Reaching for Books.*" So that "my anticipation shall prevent their discovery" and the criticism of my critics "moult no feather," I will promptly confess that I chose it for the purpose of attracting attention to an essay upon a very dry subject which otherwise might probably escape the notice of some whose perusal of it I wish to secure. The octopus of my discussion is not a very large or very terrifying octopus, and, perhaps, it is not an octopus at all, but only a ciliated esophageal ganglion trying to be an octopus. However that may be, I drop the metaphor with the title, and in the following pages I shall rely upon legitimate argument only.

It has seemed to me worth while to present in the briefest practicable form some of the answers to the arguments made by the publishers' spokesman in support of the principal changes in the existing copyright law which they urge, and which I believe to be adverse to the public interest. In summarizing their positions I have taken, mainly, the statements of their spokesman, the Secretary of the Publishers' Copyright League, because he has appeared the most prominently in the discussions, and his expressions enable their positions to be stated with clearness. In quoting from him I have preferably quoted from his letters and essays because they seemed to express his views with more deliberation than his spoken utterances.

WM. A. JENNER.

34 Pine St., New York.
April 23, 1908.

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Importation of Foreign Copies of American Authors' Works.

Upon the subject of allowing importation of foreign copies of American authors' works I care to say very little. It is in part a question of expediency and in part a question of strict principle. As a practical question it is of very little moment. Importations of foreign made copies of American authors' works must be extremely infrequent. There is no motive for importing them unless they can be brought here more cheaply than the American copy can be bought here; allowance of importation is a useful restraint upon the American price. The librarians, especially Mr. Cutter of Northampton, made this point clearly.

While it is said, and with much plausibility, that an American publisher should be protected in the publication of an American author's work and have exclusive control of the American market, yet, on the other hand, it may be said with equal or even more reasonableness, that, in the Republic of Letters every author is a citizen of the entire domain bounded by International Copyright, and so are his readers, and geographical divisions should not exist within it; that the interests of literature and intellectual culture require an unrestricted interchange of books between all parts of that empire *for individual use.*

An American author receives his royalty on every copy sold in this country and on every copy sold abroad, and, when a copy has paid its royalty, it should be free to circulate everywhere within the domain of International Copyright. That is the vital principle of International protection. I do not much care for publishers' interests in this connection. There are,

always have been, and always will be, plenty of publishers to undertake the publication of books upon those conditions which are most conducive to the interests of the author and the people. I do not believe that the publishers themselves much value the prohibition of importation of foreign copies of American authors' works, and I do believe that the clamor which has been made about it is merely to cover other designs. It does not seem to me to be a practical question.[1] The existing law has worked well, but, if the Committees should deem it expedient to change the law, I beg to suggest for their consideration whether the new law should distinguish between imported copies which have been *made* here and copies which have been *made* abroad.

Importation of Foreign Made Copies of Foreign Authors' Works.

Amend section 34, subd. (e) clause First (Mr. Smoot's bill, page 20, lines 8 and 9. Mr. Currier's bill, page 19, lines 21 and 22) by striking out the words

"under permission given by the proprietor of the American "copyright."

Reasons for the amendment:

The section, if so amended, will then permit a private citizen to import, as matter of *right*, one copy of a book published in a foreign country, for his own use, but not for sale.

The bill concedes that right of importation, as a *right*, by the authority or for the use of the United States; also when the book is imported by or for any public library or other analogous in-

[1] I am accustomed to receive frequently catalogues of dealers and of auction sales. A copy of a foreign published work of an American author does not occur in them once a year or in two years. I state this as an impression only, and not as a matter of examination and reckoning.

corporated institution; also when the book forms a part of the "personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale."

To concede the right of importation to the government, to libraries and other institutions, to incoming travellers, and to deny the *right* to private home-staying citizens, is an invidious discrimination against the citizen and is ethically, if not legally, class legislation.

The citizen who by preference employs his leisure in travel through his own land, the poor student, the scholar too poor or too busy to travel abroad, whether he lives near to or remote from a public library, needs the foreign book as much as the government, the public library, or the returning traveller, and his right to import it should be as sacredly preserved.

The right of the citizen to import a foreign-made copy of a foreign author's work has existed from the settlement of the country down to the present hour. No reason exists for taking away the right now.

No foreign country imposes such restrictions upon importation of foreign works by individuals.

No American author can be injured by importation, because the imported copy can no more compete with American authors' works than the same book could compete, if made in this country.

The foreign author is not injured, because the sales of his book in his own country are increased by the number of copies made in the country of origin, imported into this country and sold here.

The question is not affected by the possible importation of piratical copies, because such copies are properly prohibited importation by section 33.

To require an American citizen to petition the proprietor of the American rights, *i. e.* the American publisher, for *permission*

to import a foreign-made copy of a foreign author's work, a right which the citizen has always enjoyed and now enjoys, is to subject the citizen to a degrading humiliation. The permission would be either refused or granted upon the terms of paying the American publisher a fee equal at least to the profit he would make on a sale of a copy of his own edition and, perhaps, a *bonus* graduated to the eagerness and means of the person coveting the foreign book. That would be paying a tax into a private pocket as a condition of exercising a natural right. Such a tax would be the same in principle as the tax which in 1773 caused the citizens of Boston to throw into the harbor a shipload of tea, and its payment would be not less humiliating than was that.

The reason given for prohibiting the importation of foreign-made copies of foreign authors' works is stated by Mr. George Haven Putnam, the chief propagandist of alleged copyright reform, himself a publisher and general bookseller at retail, in an article in *The Independent* (N. Y., Nov. 10, 1907):

"The book-buying public has also a direct business interest "in the matter. There are many books of which a publisher is "prepared to undertake the production of American editions "only when he can be assured of the control of the market that "he has purchased. If such control cannot be assured and the "book is not undertaken in an edition *suited for the special re-* "*quirements of American readers*, a large number of these readers "fail to have knowledge of the existence of the book or to se- "cure service from it. The readers who have to purchase their "copies are obliged to take these in the transatlantic edition, "which is, as a rule, *not so well suited for American requirements*, "and which is usually higher in price than an edition printed "on this side." (*Italics mine.*)

No American citizen should be compelled to take a *version* of a foreign author's work, adapted by the American publisher, while the government, libraries and incoming travellers may

have the *genuine* work. He, also, should have the right to obtain the genuine work if he wants it. Genuine copies of original works of foreign authors, in law, medicine, theology, science, art, political and social economy, are forbidden to him by the pending bills, as well as works in general literature.

The Bar Association of New York, by resolution of its special committee, asks that the odious condition of obtaining permission of the "proprietor of the American copyright" be expunged, and, in fact, the opinion of every disinterested person is against it.

Significance of "Under Permission." Under it American Labor Could be Injured.

Mr. George Haven Putnam contends that importation of foreign made copies of foreign authors' works should be tolerated only "under permission" of the purchaser of the American rights. Mr. Putnam is, perhaps, best known to the public as an advocate of what he calls copyright reform. In that propaganda he is zealous and indefatigable; however much he may weary others by the monotonous iteration of his arguments, he is himself unwearied; always fluent and always brisk. G. P. Putnam's Sons, a company of which he is the president, is a bookseller, a dealer at retail in new and second-hand books and advertises "all the books of all the publishers" in "our comfortable retail store;" it is also a publisher, to some extent, of American authors' works, buys American rights in British authors' works and editions of British books in which it inserts its own title page and calls itself the American publisher. Now, in the entire course of this copyright controversy I have been unable to discover any proposition advocated by Mr. Putnam as a reform, which would not, if enacted, promote his business

interests in one or other of the relations which he bears to the subject. That concurrence of interest and advocacy do not, however, lessen the *possibility*, whatever effect it may have on the *probability*, that the propositions for which he stands are for the advantage of authorship and the good of the people. His proposition that a foreign made copy of a foreign author's work shall be imported only "under permission" of the purchaser of the American rights, requires, therefore, considerate examination.

The *expediency* of allowing importation of foreign made copies of foreign authors' works follows as a conclusion from the concession of the right of importation to the government, to libraries and other associations, to incoming travellers, and also to individuals *under permission* of the purchaser of the American rights. The number of government officials requiring the genuine books of the foreign author for use in bureau work, the number of public libraries buying books for readers' use, the number of other associations maintaining technical libraries, and the number of incoming travellers who bring in at least one or two books purchased abroad, must in the aggregate be large, but the number of individuals who care so much for the foreign made book as to be at the trouble and expense of importing it and paying the duty must be relatively very small. This limited class of bookbuyers do not deter publishers from *adapting* the foreign author's work to what they conceive to be the American taste, that is, to the form which they think will sell, and their possible purchases form no impediment to the publisher's enterprise. What then is the cause of such pertinacious efforts to forbid the importation of foreign made copies of foreign authors' works except *under permission?* The cause lies on the surface; it exudes at every pore; it is the desire of making more money by taxing the individual book buyer for

the price of permission to import, if the bookbuyer is unwilling to accept the publishers' adaptation.

If the publisher—the purchaser of the American rights—has the power to forbid importation, he will grant or withhold permission as interest may incline; and when Mr. Putnam says that the "student or reader" can place his order "with any intelligent bookseller, who has no difficulty in arranging through the publisher controlling the American copyright, for the importation required," the meaning is that the tax on the *student or reader* will be collected through the dealer, or that the publisher will *himself* supply the foreign book to the intelligent bookseller for the latter's customer—at a price. It is perfectly plain that if such transactions occur to any material extent, the incentive to the American publisher, who purchases the American rights in the foreign author's work, to reprint the work or adapt it to the American reader, is diminished just as much as if the bookbuyer should be at liberty to import for himself without buying permission. Therefore the contention that control by the American proprietor over importation by the individual is necessary in order that the publisher may be encouraged to *adapt* the foreign author's work to the American reader fails.

But this suggestion of the facility with which the intelligent bookseller can *arrange* through the publisher for importation requires some further examination. Mr. Putnam did not explain the nature of that arrangement. A considerable danger to the settled policy of Congress seems to lurk in its possibilities. G. P. Putnam's Sons are booksellers and also importers and publishers.

The prohibition of importation for use and not for sale is for the benefit of the typesetter whose labor in making the American edition of the foreign author's work is a condition of the copyright monopoly given to the foreign author and his

assigns, the American publisher. Is a bookseller's importation at the request or upon the order of a customer an importation for use and not for sale? If it is not, then a bookseller cannot arrange with the publisher for an importation of the foreign book without violating the law and the American publisher's connivance in that importation would, in my opinion, be itself a violation. If, on the other hand, such an importation *is* an importation for use and not for sale, then why may not G. P. Putnam's Sons, as a bookseller, make such importations, and if it is also the proprietor of the American rights, why may it not arrange with itself for the importation? If it can do this respecting one copy, it can be done with respect to a thousand or five thousand copies.

G. P. Putnam's Sons as proprietor of the American rights or a dummy proprietor can simply give a standing permission to G. P. Putnam's Sons as bookseller to import as many copies of the foreign made book as will find a market. The proprietor will not sue himself as bookseller, and the dummy will not sue, for infringement of the copyright, and there will be no one to set the law in motion, and there will be no law to be moved.

The requirement of manufacture in this country of "an edition suited for the special requirements of American readers" will be no hindrance to that arrangement of proprietor and bookseller because the adapted edition could be made at the minimum cost merely to satisfy the conditions of manufacture here; two published copies of the adapted edition would secure the copyright, the cost of which would easily and quickly be recouped, especially if the proprietor-publisher-bookseller should have a typesetting, printing and binding establishment of his own. G. P. Putnam's Sons happen to have such a shop.

If the arrangement between proprietor and bookseller should take that form, and I see no reason why it should not, what

would become of the interests of labor, which the existing law protects and the pending bills propose to protect? I imagine that so far as the making of the books actually distributed to the American public is concerned, the advantages to American labor would be practically *nil.*

For the foregoing reasons, the American publisher or copyright proprietor should not be allowed to import any foreign made copy of a foreign author's work *for sale,* or to become a party to any *arrangement* with a dealer or any one else whereby such an importation can be made, or be empowered to grant *permission* for such importation. Such privileges would be liable to abuse, and, in the natural course of business, would be continually abused.

On the other hand, the individual, if he wants the foreign made book *for use* must import for himself. This may be attended with more inconvenience than if he should give his order to a dealer, but to that inconvenience he must and should, as now, patiently submit for the benefit of the *bona fide* American edition. With respect to such importation every individual is, under the existing law, on exactly the same footing; the money-order department and the mails are open to all alike, and, as an official of the Treasury Department has certified, the duty on importation is regularly levied and collected.

Freedom of Importation by the Individual is no Injury to the Foreign Author.

The publishers claim that if importation is permitted the foreign author is injured because the American market will be rendered uncertain, and, because of that uncertainty, the American publisher will therefore pay the foreign author less for the

manuscript. The argument is without substance for several reasons.

The market for a book is always an uncertainty, because it depends upon the subject, the reputation of the author, the merits of the composition, the extent and skill of advertising it, its form, its price, and the temper of the public at the time.

The publisher pays the foreign author or the foreign publisher either a royalty upon each copy sold, or pays him a fixed sum for the entire right. In the former case, it makes no difference to the foreign author or the foreign publisher, whether a reader here buys a domestic copy or buys the foreign copy, because on each he receives his royalty; in the latter case the publisher estimates the number of copies which can probably be marketed, all the elements of the speculation being duly considered, and bases his paying price upon that estimate; the foreign author may or may not sound several publishers, and, in either case, takes the most he can get. The cost of the book is the one certain factor; the number of sold copies among which that cost will be distributed is the uncertain factor. In estimating the latter element the publisher knows that the libraries will not buy the foreign edition, if his own is decently made and is sold at a reasonable price, he knows whether officials of the government will want the foreign copies for their work and about how many, the importations of incoming travellers may be guessed at reasonably, and the number which individual students, scholars or booklovers may want is capable of approximate estimation. The last will not affect the price paid to the foreign author by a shilling.

Alleged Inconsistency in Granting Copyright and Qualifying it by Privilege of Importation Does Not Exist.

The favorite form of another argument frequently made by Mr. G. H. Putnam is that the existing law gives copyright with one hand and takes it away with the other, by which he means that one section grants copyright and another section limits the extent of the grant. The argument is not more reasonable than that of the rural express-agent who insisted that "pigs is pigs" and accordingly taxed guinea-pigs in a cage at the rate prescribed in his tariff for porkers. Copyright is not given with one hand and withdrawn by the other; the copyright granted is limited by expedient conditions. To limit the extent of the grant is just as expedient, and just as consistent with the grant, as to limit its duration. Mr. Putnam is unable to understand that simple proposition, and it is not necessary that he should, but, if he could have been enlightened, much trouble and time would have been saved to many busy men.

Nothing interferes so much with the normal operations of the intellect and the intelligence as to be *possessed* by an idea. Under its dominion the faculties become incapable of discerning discordant facts, or their logical relations, or of presenting a case justly or of appreciating the arguments against it. The publishing advocates of copyright reform, their sympathizers and allies seem to be possessed by the idea that the entire copyright question consists of a grant by the government to the author or his assigns of a monopoly for the longest term which will be a *limited* term under the Constitution. Grant that as the author's right, they say, and all other rights and interests will yield to it. For persons so unhappily afflicted there seems to be no relief except the Gadarean remedies—exorcism or a plunge into the sea.

Relevancy of Foreign Statutes Relating to Importation.

I have received, gratefully, from Mr. Putnam, the Librarian, a copy of a statement and compendium of foreign statutes and opinions relating to importation into foreign countries of copyrighted works, which were prepared by him at the request of the Committees. The time at my command has not enabled me to examine all the original sources to which he resorted or to ascertain whether additional *data* exist. I am quite willing to regard for present, if not for all, purposes, his statement and compendium as a full and accurate response to the Committees' request.

It does not seem to me that foreign statutes regulating importation are especially material, although, being *in pari materia* with our statute, they may afford useful suggestions. The policy of our country is peculiar in the respect that it requires the typesetting, and, under the proposed bill, will require the printing and binding, that is, the manufacture to be done in this country as a condition of copyright. No other country excepting Canada requires that condition. That policy, adopted in 1891, is, at least to the extent of its present application, to be preserved and should not be impaired by indirection. It is also the policy of the existing law to allow importation of foreign made copies of foreign authors' works by the government, by libraries and other institutions and by individuals *for use* and not for sale; this policy should also be continued unless some good reason exists for limiting its operation. Those two policies can exist, as they have existed since 1891, side by side.

Our country must also be distinguished from all foreign countries by another important difference. The materials and the labor which enter into the manufacture of a book cost much more here than in any foreign country, and the duties imposed

by our tariff upon the manufactured book is less *ad valorum* than the duties imposed upon the materials which enter into that manufacture, as paper, type and printing ink. Those facts as well as the policies mentioned must be considered and the policies be concinnated with the facts.

Suppose a book to have been written in England by an English author for the English public and a thousand copies to have been made in England by the English publisher for the home market; plainly, a thousand additional copies could be made at the mere cost of paper, printing and binding, and, after the carriage and duty on importation are paid, be placed in the bookseller's store in this country for a less sum than it would cost to set up and make the same book here in the same style. If the law should sanction or permit importation by the American proprietor of the American copyright, *i. e.* the American publisher, his commercial interests might often operate to cause the importation, and the policy of requiring the book to be made in this country would be impaired.

I have shown in a preceding section how the law permitting importation by individuals for use and not for sale *under permission* of the copyright proprietor, if the statute is construed to permit the importation by the publisher upon *arrangement* with the "intelligent bookseller" acting on the order of a customer, would operate to permit the American publisher to import as many copies of the foreign book as he could market upon the order of dummy customers ostensibly for the dummy's use, but actually for sale by the American proprietor, thus practically defeating our governmental policy of requiring the book to be made in this country. And, therefore, the law ought not to sanction any *arrangement* by which the American publisher can import at all, *except for his own individual use, and not, either directly or indirectly, for sale.*

The Canadian Law.

Under the Canadian law, as explained and quoted in the compendium of Mr. Putnam, the Librarian, the right of libraries and incorporated societies to import two copies for the use of members is granted, notwithstanding any prohibition, but respecting an individual, a resident of Canada, desiring a copy of, say, the London edition, the law provides that he "may apply "either directly or through a bookseller or other agent" to the Canadian licensee, *i. e.* the publisher "for a copy of any edition "of such book then on sale and reasonably obtainable in the "United Kingdom" "and it shall then be the *duty* of" the Canadian publisher "to import and sell such copy to the per- "son so applying therefor, at the ordinary selling price of such "copy in the United Kingdom—with the duty and reasonable "forwarding charges added;" and the failure or neglect to import, without lawful excuse, authorizes the Minister to suspend or revoke the prohibition of importation.[1]

The Minister is also authorized by the act to suspend or revoke the prohibition upon importation if it is proved to his satisfaction that (*a*) the license to reproduce in Canada has terminated or expired; or (*b*) that the reasonable demand for the book in Canada is not sufficiently met without importation; or (*c*) that the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or (*d*) that any other state of things exists on account of which it is not in the public interest to further prohibit importation.

It appears by a note in the Librarian's statement that the

[1] Act of July 18, 1900, 63 & 64 Vic. ch. 25. The compendium of the Librarian was furnished to me by him in the form of typewritten Ms. and I am, therefore, unable to refer to the printed report of the Committees' proceedings, which, I understand, has not yet come from the press.

validity of the Canadian statute is doubted as being "*prima* "*facie* in conflict with the Imperial statutes."

I have no means of ascertainig how the statute has worked since it has been in operation, and the term of less than eight years, during which it has been in force, is hardly sufficient to have afforded much valuable experience. That the principle of allowing importation by the individual has been preserved and carefully guarded is worthy of note. His importation is not *under permission* of the copyright proprietor, or licensee, otherwise the Canadian publisher, but is an *absolute* right. The licensee—publisher—is bound to import upon *demand* and deliver the book to the individual at the London selling price with duty and forwarding charges (postage) *only* added, and if he fails to do so, the prohibition of importation is suspended or revoked.

Assuming the act to have worked conveniently in Canada, it does not follow that an act suitable for a country of five million people is suitable for a country of eighty-five millions. We cannot open the door to importations of the foreign books by the American publisher *for sale*, if we wish to preserve to American labor the manufacture of the American reprint, and there is no government officer who can, conveniently, be charged with the duty of determining the existence of the various conditions which authorize in Canada the suspension or revocation of the prohibition of importation. The Canadian statute, I should suppose, would be found defective in not further defining the "ordinary selling price" in the home market. During the first season after publication a book will be sold at a uniform price, but after that it generally has more than one selling price,—the price of a new copy and the price of a second-hand copy, the price of a first edition and the price of a later edition, and these divergences increase with the lapse of years.

British Statutes Permit Importation by Individuals and Libraries for Use but not for Sale.

Again relying mainly on the Librarian's statement and compendium, it appears that the right of importation is now controlled in Great Britain by an Act of 1842 and an Act of 1844. The Act of 1842 (Sec. 17) prohibits importation for *sale* or *hire* of reprints made outside of the British domains, except as such importation shall be made *by* the British copyright proprietor *or with his assent.* The section was specifically made applicable to books *first* composed or written or printed and published in the United Kingdom and reprinted outside of the British domains. Importations by libraries or other institutions and *by individuals* were not distinguished. It would seem that if the importation is *for use* only and not for sale or hire, it is not prohibited. The International Copyright Act of 1844 (Sec. 10) prohibits importation *without consent* of the British copyright proprietor of "all copies * * * printed or reprinted in any foreign country *except that in which such books were first published;*" the words "for sale or hire" being omitted.

The Acts of 1842 and 1844 came under judicial review in the case of *Pitts* v. *George* (1896), 2 Ch. 866. The case involved a musical composition (regarded as a book) first composed, published and copyrighted in Germany. The plaintiff, as assignee of the British copyright, sought to restrain the defendants from importing *for sale* copies of the German edition, which they had bought in Brussels. The question turned on the effect of Sec. 10 of the Act of 1844 upon Sec. 17 of the Act of 1842 which had not in terms been repealed. The defendants contended that the Act of 1844 by implication excepted the *original* foreign edition and was to be construed as a limitation of the more general prohibition of the Act of 1842. The lower court sus-

tained this contention, but on appeal the decision was reversed by the vote of two of the judges, one judge agreeing with the court below, and the importation of the German edition, although the original, was held to be barred. Thus there were two opinions in favor of exclusion and two against it.

So far the British Acts are not applicable to our conditions at all, because *both* the Acts of 1842 and 1844 permit the importation of the foreign edition *for sale or hire* either *by* or *with the consent of* the British copyright proprietor. Similar freedom of importation by the American publisher cannot be tolerated in this country in any form or under any guise, if we intend to preserve the policy of requiring the American reprint to be made by American labor.

The Act of 1842 did not *expressly* distinguish between importation *for sale or hire* and importation *for use* only, and, as already said, the Act of 1844 did not refer to the *object* of the importation at all. As the defendant's importation in the case of *Pitts* v. *George* was *for sale* the question of the right to import *for use* only did not arise, but in considering the question the judges referred to that aspect of it. As the court held that the Act of 1844 did not supersede the Act of 1842, the earlier Act, would seem to control the question. Now as the Act of 1842 expressly prohibited importation only *for sale or hire*, it would follow that importation *for use* only was not prohibited, and, accordingly, Lord Justice Rigby, one of the judges who participated in the majority ruling, remarked (p. 878)[1] that the Act of 1842 "provides only against importation for sale or hire. "A book lawfully printed abroad might, so far as this Act was "concerned, be lawfully imported by the owner of it for *his* "*own private use* though not for sale or hire" and in referring

[1] This and following quotations are taken directly from the opinions of the judges as given in the official report of the case.

to the International Copyright Act of 1838 remarked (p. 880) that by it "the importation of books otherwise than for sale, "as, for instance, for hire or for the private use of the importer, "was not struck at" and in considering the reasons for the enactment of 1842 said (p. 881) "it may have been thought *undé-* "*sirable* to go so far as to prohibit importations *for private use* "from the country of origin, where many persons might be "expected to purchase the books honestly and fairly for pri- "vate use." Lord Justice Lindley said (p. 872) referring to Section 17: "This section, however, is confined entirely to printed "books composed or written or printed and published in the "United Kingdom. It does not apply to other books" and referring to both Section 17 and Section 15 said "neither of these "sections prohibits importation *for private use*, but only impor- "tation for sale or hire;"

Now, if the view of the two majority judges was correct, importation into the United Kingdom from abroad of a book originating in a foreign country is legal, notwithstanding the British copyright, if the importation is *for use* and not for sale or hire; and if the ruling of those two justices was wrong, and the ruling of the dissenting Lord Justice and that of the Lord Justice in the court below, whose decision was reversed, was correct, then importation into England of books originating abroad is legal even if the importation is for sale or hire, and the same thing would be true, of course, of an importation for use. I do not find that the case went to the House of Lords.

The Librarian in his statement coincides with this conclusion, but I find upon examining the opinions in *Pitts* v. *George* that the matter may be stated somewhat more strongly than he states it in favor of an existing right of importation into the United Kingdom of foreign books *for use*.

Mr. George Haven Putnam in his *Independent* article, quoted

above, wrote as follows touching the subject of importation into England:

"The English publisher who has purchased the British copyright of a work has secured under the law the *exclusive* control of said work for the British territory."

In view of the foregoing exposition of the British law, Mr. G. H. Putnam's statement requires considerable qualification; it needs to be pared by about ninety-nine per cent of its scope, and if that is done, the thin sliver of fact remaining would be irrelevant to the subject we are discussing.

Continental Countries.

It appears from the Librarian's statement that the law of Belgium penalizes the importation of an illicit edition for a commercial purpose, but does not forbid the importation of a copy for private use; also that the law of Germany of June 11, 1870 made the same limitation and distinction but the present statutes omit mention of it. A recent commentator, Kohler, insists "that importation of foreign editions is a professional and a literary necessity and that though 'the law is silent upon this point * * * (the privilege) follows of itself from the reasonable objects of the law'" and "he contends therefore that 'single copies' of *any* foreign edition 'sought out and furnished for libraries or collectors, from motives purely literary or relating to the history of culture' *may* be imported notwithstanding the general prohibition." This I understand to be the opinion of a learned commentator upon the state of the existing German law. My quotation is from the Librarian's statement.

Respecting the practice in other continental countries the Librarian states that, upon personal inquiry last year at the International Bureau of Berne, and at the Copyright Bureau in

Paris, and at the office of the Society of Authors in London, "the officials disclaimed precise knowledge respecting the practice of prohibition or allowing importation of copies merely for private use or by institutions and that the question appeared to them to be a novelty."

Shall our government of, for, and by, the people be less liberal and less just to the individual scholar, student and reader than are the monarchies of Europe?

The Allegation that the Privilege of Importation was Inserted Surreptitiously in the Act of 1891.

Mr. George Haven Putnam often charges that the right of importation was inserted in the Act of 1891 at the last moment and without reflection. In his *Independent* article, from which I have quoted above, he wrote:

"During the *last hours* of the session of 1891 certain interpolations were made in the bill which, so far from being germane to the principles of copyright, were very directly opposed to copyright. The provisions then inserted (it may be said *surreptitiously* inserted) had not had the advantage of consideration or discussion in the preceding conferences—conferences which had extended over a period of five years; and they were, in large part, inconsistent with other provisions of the bill and with copyright itself."

One of the provisions referred to is that permitting importation, the other being the requirement for manufacture in this country. If either provision was inserted *surreptitiously*, that fact would be good reason for reconsideration, but it was not the fact. To charge that an act is done *surreptitiously* is to impute a trick, and is equivalent to saying that it was done stealthily, underhandedly, dishonestly, fraudulently. Whose trick, who did the tricking, how was the trick worked? There is one

senator still a member of that body as high-minded as any senator who ever sat in it, and who must have been a party to the trick, if there was one. There are others still sitting who were tricked and would resent it even now, if it were the fact. Nothing was done surreptitiously. The point was debated *pro* and *con* on several days during the three weeks preceding the passage of the bill and finally was considered in conference committee. I give in an appendix extracts from the speeches of several senators on the subject.

It may be that the bill of 1891 when prepared by the preceding conferences of that day did not provide for the right of importation as it now exists in the statute. If so, Congress perceived the omission, understood it, and, supplied the defect.

The Pending Bills Permit the Library of Congress to be Deprived of Copies of Copyrighted Books.

There should be at least one library where a copy of every book copyrighted in this country may be found. That library is naturally the Library of Congress. Existing law requires that the copyright taker shall *not later* than the day of publication deposit in the mail addressed to the Librarian, two copies of the book to be copyrighted (Rev. Stat. Sec. 4956). This deposit is a condition of the copyright. It is a small tax for an exclusive privilege of many years duration.

The framers of the pending bills ingeniously evaded this obligation to deposit in the following manner: By Section 10 (Sen. No. 2499: H. R. No. 243) copyright is secured *merely by publication* of the work with a notice of copyright inserted in it, and no deposit of any copy of the book in the Librarian's Office or in the mail is required as a condition thereof. Section 13 provides that *after* the copyright has been secured by publica-

tion of the work, there shall be deposited in the Copyright Office or in the mail two copies of the book, but there is no limitation of the period after publication when such deposit must be made, and, therefore, if such deposit is made at *any time* within the copyright term, the requirement of deposit is satisfied. It is, however, provided by Section 13 that no action or proceeding shall be maintained for infringement of the copyright until deposit of the copies and registration of the copyright has been made. As, according to past experience, not one copyright of a book in ten thousand has ever been the subject of litigation, and as, under the pending bills, if enacted, the penalties for infringing a copyright are much more severe than under the existing law, the proportion of litigations to copyrights taken is likely to be not greater than one in ten thousand. Therefore the condition that an action shall not be maintained on the copyright until deposit or registration is not of a nature to require either, because both deposit and registration can be deferred until the day before the action or proceeding on the copyright is commenced, if the copyright proprietor should ever deem legal proceedings necessary. So far then the copyright proprietor is under no pressure to deposit any copy of his copyrighted book for the benefit of the Library of Congress.

But, if the copies are not promptly deposited, then, by Section 14, the Register of Copyrights may "upon specific written demand require the proprietor of the copyright to deposit them," and if, after the demand, the copies are not deposited within one month from any part of the United States except an outlying territory, or within three months from an outlying territory or foreign country "the proprietor of the copyright shall forfeit said copyright." This seems minatory but is not so in fact. The demand must be in writing, and, to be specific, must specify the book, and the demand must, and should, be

served upon the copyright proprietor personally. A substitute service will not, and should not, be permissible.

In the first place, the Register, in order to make "specific written demand," must learn that the work has been copyrighted. How will he learn that fact? Advertisements of the book will not inform him, because they never mention the fact of copyright. He will receive no notice that a copyright has been taken and can learn the fact only by purchasing all published books and searching in them for the notice. When the Register has discovered that a book has been copyrighted, the next thing will be to serve "specific written demand" upon the copyright proprietor. If the copyright proprietor is *a dummy* with whereabouts unknown, service of the specific written demand would be difficult. But assuming service to have been made, and that he makes default in depositing the copies, the consequences are practically nothing. Infringement is improbable with regard to most books after the book has been on the market for a season and the cream of the profit has been skimmed by the first publisher, and if any one should desire to reprint it without authority, he would be deterred by the severe penalties visited upon infringers, because if the copyright proprietor wished to sue him, he would then deposit the copies required by Section 13, although the periods prescribed as those within which deposit must be made after service of the specific written demand should have long since expired. The burden of proving service of specific written demand so as to cause lapsing of the copyright would be upon the infringer.

Section 11 provides that the copyright proprietor "may obtain registration of his claimed copyright by complying with the provisions of this Act," but this provision is without value either to the Register as a means of giving him information of copyrighted books or for any other purpose. It is permissive

and not mandatory. If no registration is made the consequences are no more disagreeable for the copyright proprietor than if he omits to deposit copies.

The existing law has worked well for many years, and I have heard no reason for changing it in the respect mentioned, excepting the assertion that many valuable copyrights have been lost because of failure of the copyright proprietor to deposit two copies in the mail on or before the day of publication, and it seems unfair to subject the copyright proprietor to that loss. I do not believe it to be true that valuable copyrights have been lost for the reason mentioned. It is possible that such a case may have occurred, but if such happenings were common, the fact would afford no sufficient reason for altering the existing law, because the duty to be performed by the copyright proprietor is simple and easy of performance. It consists merely in depositing two copies in the mail without pre-payment of postage, taking from the postmaster a receipt. His duty is then discharged, and he is not responsible for failure of the copies to reach the Librarian's office, if they do fail. It is easier for the copyright proprietor to remember to deposit the copies on or before the day of publication than at some uncertain later date, when, for the publisher, the book has ceased to be new. Forgetfulness or carelessness on the part of a mailing clerk cannot and ought not to be admitted as an excuse.

The existing law requiring copies to be deposited on or before the day of publication was enacted in 1891. Before that date, the copies were required to be deposited within definite periods after publication. That latitude of time produced inconvenience and the law was changed. The pending bills revert to the old law but mar it by substituting an indefinite and contingent period for the former definite period. It has been suggested that the pending bills should be changed so as to re-

quire the deposit of copies to be made within a reasonable time after publication. That would, in my opinion, be worse yet, because who could tell what a reasonable time might be. A reasonable time for the performance of an act depends upon the nature of the act, the situation of the actor, and his relations to the act and its objects. A reasonable time would vary in each particular case according to its circumstances, and if the action by the copyright taker should be at law as distinguished from equity, the defendant pleading that the copyright had lapsed by reason of non-deposit, the reasonableness of the time within which deposit was made would be determined only by the verdict of a jury.

The pending bill should, in my opinion, adhere to the existing law in respect of requiring deposit of copies before copyright, as a condition of copyright.

Unpublished Works.

Section 2 (Sen. No. 2499, H. R. 243) provides:

"Sec. 2. That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefor."

If the section affects unpublished works at all its validity under the Constitution is doubtful. Copyright, respecting which Congress may deal under the Constitution, is concerned with *published* things only. The States may deal with *unpublished* things. If the section is retained it should, I suggest, be altered to read as follows:

"Sec. 2. That nothing in this Act shall be construed to *affect* the right of the author or proprietor of an unpublished work,

at common law or in equity, respecting the copying, publication, or use of such unpublished work, *provided* that application for copyright shall be deemed an abandonment of the author's literary property at common law."

But the section is unnecessary. Since *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652, it has never been doubted that the author of an unpublished work has the right, in equity, to suppress its unauthorized publication, and to recover at law damages therefor, and this under the common law. The rule applies to all kinds of intellectual works. It was applied to private letters in *Woolsey* v. *Judd* (1855), 4 Duer (N. Y.), 379, where the court, upon a full examination of adjudged cases, held, six judges sitting *in banc*, that the law must be considered as established: That the writer of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same; and that, without his consent, they cannot be published either by the person to whom they are addressed, or any other. An important exception, however, is that the receiver of the letters may justify their publication, when it is shown to be necessary to the vindication of his own rights or conduct against unjust claims or imputations. But a stranger who has possessed himself of the letters or of copies unlawfully is not justified in publishing them for any purpose whatever. The holding was upon the ground that the exclusive *property* in the written matter remained in the writer.

So far as Section 2 may affect the property in unpublished works at all it is, in my opinion, undesirable as well as unnecessary, because it substitutes the rigidity of a statute for the flexibility of the common law.

Control of Retail Prices by the Publishers.

Argument is not needed to persuade the Committees that no scheme which would permit publishers to control the retail prices and to restrict the distribution of books after their first sale by the publisher at his own price, should be sanctioned by law. As soon as that scheme was detected by the Committees in the bill originally framed the section [1] which had been devised to accomplish that object was promptly denounced. The only danger is that by some other cunningly contrived section the same result may be accomplished.

The history of the publishers' and booksellers' effort to control and maintain retail prices and restrict the distribution of books, except upon price conditions determined by the publishers, and the agreements of the publishers' and the booksellers' associations to that end, is fully set forth in the case of *Bobbs-Merrill Co.* v. *Strauss*, 139 Fed. Rep. 155, and *Charles Scribner's Sons* v. *Strauss*, *Ibid*, p. 193, which were decided in July, 1905, against the publishers.[2] The defendants in those cases were the department store, well known in New York City as R. H. Macy & Co.

[1] See original bill 59th Congress, Sen. No. 6330 H. R. No. 19,853. Section 1, subd. (b) which provided that the copyright should include the "sole and exclusive right"—"to sell, distribute, exhibit or let for hire, or offer or keep for sale, distribution, exhibition, or hire any copy of such work"; in connection with Section 23 defining infringement, which provided that infringement should consist in "doing or causing to be done, without the consent" &c. —"any act the exclusive right to do or authorize which is by such laws reserved to such proprietor" and Section 34 which provided "that each of the rights specified in Section one of this Act shall be deemed a separate estate subject to assignment, lease, license, gift, bequest, inheritance, descent or devolution."

[2] These decisions were affirmed on appeal by the Circuit Court of Appeals for the Second Circuit, in June, 1906. (See 147 Fed. Rep. pp. 15 and 28). From that affirmance the publishers appealed to the Supreme Court of the United States. The appeals have been argued in that court, but at the present writing have not been decided.

The *general nature* of the agreements between the publishers and the booksellers may be derived from a letter printed in the *N. Y. Evening Post* of November 17, 1906, over the signature of Mr. George Haven Putnam in which, referring to the agreements which were in litigation, he said:

"The main issue to be determined in the cases that have been brought into court on this side is whether the publishers are warranted, under the existing American law, *in declining, under agreement with each other, to supply copyrighted books to the department stores* in question (or to *any trade customers who decline to make agreements or who fail to adhere to agreements for the maintaining of catalogue prices*)." (*Italics mine.*)

Their *effect* may be derived from the following quotation from the opinion of the New York Court of Appeals in *Strauss* v. *American Publishers Assn. et al.* (177 N. Y. 473).

"It will be seen that while the leading *object* of this portion of the agreement apparently is *to maintain the retail net price* of copyrighted books it operates in fact so as to *prevent the sale of books* to dealers who sell books of *any* kind to one who *retails* copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been *blacklisted*, but that all that shall be required to govern his action, and to prevent him from selling to such a person, shall be that the name has been given to him, by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, *thus breaking up his business.* But, it is said, that is only intended as a *punishment* for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a *destruction of his business*, because of his refusal to abide by the rules of the association."

And their *legality* may be derived from the following quotation from the Court's opinion in *Bobbs-Merrill* v. *Strauss*, 139 Fed. Rep. at p. 192:

"In the case of copyrighted books it is evident that if the publishers of one or two should demand and exact of the purchaser at retail a grossly unreasonable price he would sell but few if any copies. Others would supply the market, for readers would forego that book or those books and find reading matter elsewhere. But when all publishers of and dealers in copyrighted books—and nearly all new books are now copyrighted—*combine* to exact a fixed arbitrary price, &c., *the readers of books become powerless*, if they would read at all, not because of the monoply granted or sanctioned by the government in granting the copyright, but *because of the new monopoly* (*the conspiracy of monopolists*), created by the agreement and combination of these monopolists, one that is forbidden and denounced by the Act of July 2, 1890 (26 St. L., 209), entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' "

In the pending bills, Section 44 reads as follows:

"Sec. 44. That the copyright is distinct from the property in the material object copyrighted, and the sale or *conveyance*, by gift or *otherwise*, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object."

The section *seems* innocent enough, but when read in the light of the decisions of the Circuit Court of Appeals in the *Bobbs-Merrill* case and the *Scribner* case, above referred to, it will be seen to probably give the publishing general booksellers' proposed monopoly practically all the sanction which they require. At any rate it will serve as the foundation for a law suit, with much greater prospects of success than has thus far attended the publishers' efforts under the existing statute, and the expenses of which could, and probably would, be defrayed by the publishers' association. It provides that the *copyright* is distinct from the property in the *book* copyrighted, and the *sale* of the book shall not of itself constitute a transfer of the copyright. The *copyright* includes, under Section 1, subd. (a), the ex-

clusive right to "print, reprint, publish, copy and *vend* the copy-lighted work;" that is, the right to vend is one of the rights which is declared to be *distinct* from the property in the book, and, therefore, the possession of a copy of the book may pass, while the right to vend that particular copy of the book may be retained by the publisher as a separate and distinct property right. As the sale of the book will not constitute a transfer of the copyright (under section 44), and as the copyright includes the exclusive right to *vend* the book, therefore, the copyright proprietor may, when he sells the book or parts otherwise with its possession, grant to the vendee of the book or to any person into whose hands it may come, only a license of retransfer (such right being a part of his reserved right distinct from the property in the book) and annex to the license such conditions and limitations as he may see fit. The price at which and the person to whom the book might be retransferred would be within the conditions and limitations which he would have the power to annex to any transfer of the book, because those limitations are necessarily included in his exclusive right to vend, which he may carve up, divide and subdivide, retain or let go in whole or in part, according to his interests or caprice.

I am aware that it was once contended by a purchaser at a sheriff's sale of a copper-plate on which a copyrighted map had been printed that the purchase of the plate gave the purchaser of it the right to print from it copies of the map. The Supreme Court pronounced so emphatically against the contention that the ruling has never since been questioned.[1] That was fifty-six years ago. The contention never will be renewed. There is no need of introducing into the statute any provision to secure the copyright proprietor against its renewal. The existing law is

[1] *Stevens* vs. *Cady*, 14 Howard (U. S.) 528;
Stevens vs. *Gladding*, 17 *ibid.* 447.

amply comprehensive and sufficiently explicit to protect him. It gives the proprietor "the *sole* liberty of *printing*, reprinting, "*publishing*, completing, copying, executing, finishing and vend- "ing"; [1] when he sells a copy, that particular copy passes outside of his monopoly. Neither the author, if he has retained the ownership of the copyright, nor the publisher, if he has bought it, needs or deserves any more. When the book is first sold the copyright proprietor, whether author or publisher, receives his profit, and their interest then ceases, as it should, and the interest of the buyer and the public then begins and becomes paramount. Section 44 is either a mask and subterfuge for the publishing booksellers' scheme, a scheme by which they can eat the cake and keep it too, or it is an ambiguous superfluous excrescence which can have no effect except to vex and intimidate the public by confusing the interpretation of the law.

The encroachment upon the people's rights was not lessened by the exclusion from the publishers' and booksellers' agreements of school-books, nor by limiting the operation of the agreements to a period of one year during which the publishers could control the retail price of any particular book. Legislation cannot distinguish between a book which may be regarded as a school book and one which is not. Southey's *Life of Nelson*, Ticknor's *History of Spanish Literature*, some of Macaulay's essays, some of Lowell's, some of Tennyson's poems, all of which are works of pure literature, are also school-books. In many cases no dividing line can be distinguished. Nor can legislation practically limit the operation of price-regulating powers to the term of one year in respect to any particular book or class of books. If there is advantage to the public, to the publisher or to the bookseller in legalizing the monopoly, the advantage

[1] U. S. Rev. Stat., section 4952.

continues as long as the publishing bookseller at retail has any copies of the book, or of any new edition thereof, on his shelves. We will do well to remember the fable of the intrusive camel, who asked leave of his master to insert only his nose under the flap of the tent, and having obtained that permission, he soon obtained entrance for his head, his neck, legs and hump, and excluded the Arab and his family. If the monopoly is legalized, it will soon be extended so as to include school-books in its operation and the term of the publishers' control over the retail prices will be limited only by the publishers' interests.

A section has been proposed for insertion in the bill to immediately follow Section 44 as a part thereof, or as an independent section, to read as follows:

"That nothing contained in this Act shall be construed to authorize or empower the proprietor of a copyright to enter into contracts, combinations or arrangements concerning the manufacture, production, use or sale of the copyrighted work or works, which would be unlawful if such work or works were not copyrighted."

The proposed section seems to fairly meet the requirements of legislative policy, and if the publishers deny that section 44 is open to the criticism made above, the proposed section will not harm their interests.

Whether or not Mr. George Haven Putnam participated in contriving the publishers' scheme I do not know and cannot assert, but G. P. Putnam's Sons of which he is president was an original member of the publishers' association, it stood to profit by the agreements, and he defended the scheme in the public press.

G. P. Putnam's Sons are retail dealers as well as publishers and importers, advertising "all the books of all the publishers" in their retail store.

In the *New York Evening Post* letter from which I have quoted above, after referring to the publishers' agreements, Mr. G. H. Putnam defended them on the ground that

"Authors and publishers have, of course, a direct business interest in the maintenance, throughout the country of an adequate bookselling machinery—that is, of bookstores carried on by intelligent, educated men who will handle not only the popular fiction of the moment, but who may be in a position, as is the case in Germany and France, to give counsel and suggestions in regard to literature of permanent importance. The maintenance of book-stores of this kind is, however, a matter of interest not only to publishers and to authors, but to the community as a whole."

"Any application of statutes, framed without reference to the special conditions affecting books, which should have as a result *the undermining of the book trade of the country, would be injurious to the interests of higher education and to the development of general intelligence, and would, therefore, constitute an injury to the entire community.*" (*Italics mine.*)

And, therefore, "the undermining of the book trade of the country" by permitting a retailer to cut the price of the *publishing* retailer "would be injurious to the interests of higher "education and to the development of general intelligence, and "would, therefore, constitute an injury to the entire community."

It is hardly worth while to examine the argument or the sentiments which compose it. The publishers' agreement did not require that the retailer should be an "intelligent and educated" man or have "intelligent and educated" clerks; it required only that the prescribed retail prices should be maintained. The clerks of the department stores are as able "to give counsel and suggestions in regard to literature of permanent importance" as are the clerks of the publishers, or, perhaps, as some of the publishers themselves. The author is benefitted by increasing the number of copies sold, not by increasing the profits on retail sales; the publisher who is not a general bookseller at retail

is also benefitted by the number of copies sold; the publishing general bookseller *at retail* is *alone* benefitted by the maintenance of his retail prices by competitors. The "interests of higher education" and the "development of general intelligence" will not be retarded but promoted rather, if books are cheap, because, if they are cheap, they will be more widely disseminated, and if the department stores have facilities for attracting customers, and the ability to offer books at attractive prices, so that a shopper, when she buys a ribbon, or when he buys a shirt, will also buy a book, "no injury to the entire community" is done.

I imagine that Mr. G. H. Putnam's objection to the trade in books conducted by the department stores springs not so much from the fact that they carry on a general business in other merchandise, but rather from the fact that, in order to move stock, they sometimes cut prices. John Wanamaker conducts department stores in New York and Philadelphia, each of which is an extensive establishment of its kind. The store in New York carries, besides general merchandise in vast variety, a large stock of both new and second hand books, and I am informed that the Wanamaker store in Philadelphia does the same. I do not find that John Wanamaker was included in the blacklist printed in the *Book and News Dealer* [1] which included many well known department stores among the firms with whom the associated publishers and booksellers were interdicted from dealing, but in *Putnam's & The Reader* (*Putnam's Magazine*) for April, 1908, published by G. P. Putnam's Sons, at page 155, I find that John Wanamaker of Philadelphia is named as one of the "special agents" for "*Putnam's & The Reader*," from

[1] For March, 1906, the official journal of the Booksellers Association, published by the Bobbs-Merrill Company. The Bobbs-Merrill Company also appears as one of the publishers of *Putnam's Monthly & Reader.*

which I infer that, in the opinion of that concern, a department store which does not cut prices is a good enough agency for the dissemination of Putnam literature, but a department store which refused to be bound by publishers' retail prices is not.

Fine sentiments are fine things in their way and place, but a platform of self-interest is not the best place for their display, and when the object of the show is not generous, let them sparkle as they may, their lustre serves only to make darkness visible.[1]

There are some persons who object to the system of department stores. They are, in general, those who wish to revert to the *good old times* when stage-coaches were used instead of railroads, and goosequills and sand instead of steel-pens and blotting-paper. Department stores are a convenience, amounting to a necessity, for millions of persons, and I imagine they will remain until some more convenient system of distribution is invented. The distinction between a business dealing in books and fancy-goods and a business dealing in fancy-goods and books is not clear to the apprehension of ordinary men, and criticism by those engaged in the former upon those engaged in the latter seems to have a hollow sound. When the publishing booksellers abandon the sale of stationary and fancy goods will be time enough for considering the expediency of dry-goods houses abandoning the sale of books.

However that may be, in my opinion, it would be better a thousand times, upon considerations of public policy from every point of view, that books should be hawked from a huckster's

[1] "Perhaps there never was a more moral man than Mr. Pecksniff: especially in his conversation and correspondence. It was once said of him by a homely admirer, that he had a Fortunatus' purse of good sentiments in his inside. In this particular he was like the girl in the fairy tale, except that if they were not actual diamonds which fell from his lips, they were the very brightest paste, and shone prodigiously." *Martin Chuzzlewit*, 1st. ed. p. 10.

cart hitched to the tail of a wagon loaded with fish and to the blare of a tin horn than that the control of publishers over the retail prices of books beyond the first sale should be extended by a single inch.

Duration of Copyright; and the Renewal Term to Authors.

The existing law grants for all literary productions a term of twenty-eight years and a renewal term of fourteen years more to the author if living, or, if dead, to his widow and children (R. S. §§ 4953 and 4954).

Since 1790, the year of the first copyright act, the law has given a renewal term to the author or his family.

The pending bills grant (Sec. 25) for posthumous works a term of thirty years; for composite works, that is, works produced by several co-operating writers, for works copyrighted by a corporation, for works by an employee made for hire a term of forty-two years; and for other works a term for the lifetime of the author and thirty years from his death.

I am unable to see why a composite work or a work copyrighted by a corporation or the work of an employee made for hire should have forty-two years' protection, while a posthumous work should have only thirty years and other works thirty years added to the remainder of the lifetime of the author which might be only a year or two or less. A posthumous work and other works if the author's expectation of life should be less than twelve years, would, under such conditions, naturally be copyrighted by corporations so as to benefit by the certain and longer term, and thus the provisions of the law in respect of posthumous works would in every case, and, in respect of other works would in many cases, be evaded. As a general

proposition statutes should not be framed so as to encourage evasion.

The reason usually assigned for granting copyright during the lifetime of the author and a fixed period beyond his death is that it is desirable that the copyright should endure, at least, during the lifetime of the author and for such a period beyond as to afford remunerative returns, if the work is capable of doing so, to the author's family. The object is meritorious, but can it not be accomplished by the grant of a third renewal term for say twelve years or by extending the existing renewal term for a longer period than fourteen years so as to make the copyright endure practically for the lifetime of the author and a considerable period beyond his death. It has been said that under the existing law not more than five or ten per cent of the copyrights taken are renewed. If that is the fact a still smaller proportion would be renewed for a third term and the public would not be materially prejudiced by such a contingent extension.

A serious objection, as it seems to me, to the plan of enlarging the term of copyright protection proposed by the pending bills is that it takes away from the author or his family and gives to the publisher the advantages of the renewal term. This is accomplished by permitting the *proprietor* of the copyright at the end of twenty-eight years to record a notice that *he* desires the full term and thereby the *proprietor* acquires the right to the full limit of protection granted by the Act. (See *proviso* to Sec. 25.)

The value of the renewal term may be contingent and small, yet, whatever it may be, I would have the author or his family enjoy it. We owe much to authors. As well attempt to count the infinite number of the stars, or compute their influence in the universe, or sum the aggregate glory of all their lights, as estimate the benefactions which authors, by their writings, have

conferred on the human race. "Knowledge," a great English orator and statesman has finely said, "is like the mystic ladder in the patriarch's dream. Its base rests on the primeval earth, its crest is lost in the shadowy splendor of the Empyrean, while the great *authors*, who for traditionary ages have held the chain of science and philosophy, of poetry and erudition, are the angels ascending and descending the sacred scale, maintaining, as it were, the communication between man and heaven."

It does not matter that the authors did not come before the Committees to plead their cause. Some are ignorant of what the bill proposes to do; some would disdain to protest against it; some are lost in their studies and meditations, and some are pursuing fame or fees in the columns of the magazines which the publishers control. Mr. George Haven Putnam said to the Committees, "We publishers are as truly the representatives "of the authors as are our old friends who are here to represent "the authors' league" [1] and he added "I have been permitted "during the twenty years since the organization of the Pub- "lishers' Copyright League to represent authors, just as my "good friend, Mr. Johnson, does." Mr. Scott, the associate of Mr. Robert Underwood Johnson in the Century Company, and the president of it, insisted that the renewal term should be given to the publisher or into his control, lest he should be left with a set of plates and remainder copies,[2] as if the battered plates had not been paid for by the author. I demur to the claim of Mr. Putnam, and of Mr. Johnson, and of Mr. R. R. Bowker, the vice-president of the Authors' League and the editor of the *Publishers' Weekly*, to acquiesce, as they did, in depriving the author and his family of the benefits of the renewal term. I have no commission from any author to speak

[1] December 1906 sessions, p. 189.
[2] June 1906 sessions, p. 54.

in his behalf, but I believe that I represent more truly than they do the authors' interest in urging that the advantages of the renewal term be preserved for them, and if every member of the League should petition to be plucked of it for the benefit of the publisher, I would look over and beyond them to those young authors essaying with unsteady wing their first flights into regions whose air the Leaguers have never breathed.

NOTE: The renewal term of fourteen years accruing under existing law upon the expiration of the first term of twenty-eight years was by the bill, as reported, preserved to the author or his widow and children, a right which the statute has always preserved. Mr. Robert Underwood Johnson, the "good friend" of Mr. G. H. Putnam, proposed as an amendment applicable to copyrights subsisting at the time the new law should take effect (that is, copyrights as to which the right of the renewal term belonged to the author and as to which the author and publisher had already made their bargain on the basis of the author's unrestricted right of renewal) that if the author should have assigned the copyright reserving a royalty, the assignee, *i. e.* the publisher, should be entitled to publish the work during the extended term on paying the same royalty as was payable during the original term, and, if no royalty should have been reserved during the first term, the author should not have the extended term at all unless the assignee (publisher) should join in the application for renewal.[1]

In the first case the author could not make a new bargain with a new publisher for the renewal term, because the first publisher would be in the field with his ready made plates and stock, perhaps, purposely augmented for the occasion, and in the second case, the author could not make any bargain with a new publisher or even acquire any renewal term at all without the first publisher's consent. Comment upon the amount of zeal for the author's interest disclosed in Mr. Johnson's proposal is superfluous. Mr. G. H. Putnam and Mr. Bowker, both of whom spoke later but on the same occasion, made no objection to the proposition.

[1] December, 1906, sessions, p. 95.

APPENDIX A.

EXTRACTS FROM SPEECHES IN THE SENATE ON THE INTERNATIONAL COPYRIGHT BILL, TAKEN FROM THE CONGRESSIONAL RECORD, VOL. 22, PART 3, 51ST CONGRESS, 2ND SESSION.

February 9, 1891, Senator SHERMAN said (p. 2386):

"Mr. President, let us go a little further. I say this is a stipulation in favor of the foreign author, the writer of the book, because it is to be presumed he has his book published in his own country and he gets the benefit of the sale of that book wherever it is sold in our own country or in his; but it proposes to give an exclusive monopoly to the person who makes the contract for the publication of the book, and that monopoly is so exclusive that no book can be brought into this country except for colleges and institutions of learning, and then only in limited numbers. No book is to be brought into this country from foreign countries without the consent of the publishers here.

"Suppose an application should be made to the person who has the contract for the publication of the book here. Is he likely to consent when that consent will interfere with his interests? *It seems to me to require a citizen of the United States to ask Mr. Harper for the privilege of bringing a book into this country from England is a humiliation to which most American citizens would not submit.* What right has Mr. Harper, because he has made a contract with a foreign author, to say whether I shall buy a book in England at the prices current there subject to the payment of duty? It seems to me that the very limitation requiring the consent of the man who is most interested against my buying a book wherever I choose is a sufficient objection to this bill.

"I put it upon broader grounds. In no case would I levy such a duty—for this is in effect in the nature of a duty—in no case would I levy such a prohibition upon such an article of necessity as a book. Books are just as much articles of necessity to an intelligent man as the food he eats and the coffee he drinks; he must have them. Most of us, when we want a book, send and get it. If we can get it in our own country we may be easily satisfied; but suppose the American publisher who has this monopoly should refuse to issue a book of sufficient taste and of a character that suits our taste, ought not taste to be indulged in, ought not fancy to be indulged in? Are we mere plodding clodhoppers, satisfied with what only American publishers will publish without any respect to our taste as to the character of type and the illustrations and all that?"

February 9, 1891, Senator CARLISLE said (p. 2394):

"It may be, Mr. President, as I believe has been suggested before during this debate, that a citizen of the United States, notwithstanding there may be fine editions of a certain work published in his own country, desires to procure a copy of some edition published abroad and prefers to have that on account of the superior manner in which it is printed or bound or illustrated, yet under this bill *as it stands* the United States would by its customs officers *stop him at the boundary of the country and refuse absolutely to allow him to bring in those books.* This is not done *for the benefit of the author,* in whose interests this bill purports to have been framed, *but in the interest of the publishers* of these books in the United States, *and in their interest alone.*"

February 13, 1891, Senator DANIEL said (p. 2610):

"The *right to import the foreign work,* on payment of the tariff tax, is the privilege of the American citizen. And if the exer-

cise of our privileges should incidentally damage anyone else, when it does not deprive him of any right of property, or any equitable consideration, why, we are not his guardians, and it is simply an incident of nature which can not be avoided."

February 13, 1891, Senator VANCE said (p. 2615):

"I think the argument of the Senator from Kentucky (Mr. Carlisle) upon that point was absolutely conclusive and unanswerable. The author makes terms with his publishers in both worlds, and when he has copyrighted in America as well as in Europe he has received all he has a right to receive. And to say that although his work is copyrighted in England and in America, yet *the production under that copyright shall not be imported here, can not be said to be for the author's benefit, but is for the benefit of the publisher in America.*"

February 17, 1891, Senator CALL said (p. 2792):

"Then, again, if copyrighted abroad under the laws and published abroad and then copyrighted here, *why should there not be a reasonable competition in the price* of the American book between the American publisher who had bought the copyright for America and the English publisher who has bought it for England?"